No. 90-1791

In The
Supreme Court Of The United States
October Term, 1991

THE CONNECTICUT NATIONAL BANK,
Petitioner,

v.

THOMAS M. GERMAIN, TRUSTEE FOR
THE ESTATE OF O'SULLIVAN'S
FUEL OIL CO., INC.,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Can section 1292(b) of Title 28 of the United States Code provide a separate basis of jurisdiction for an appeal to the court of appeals of a district court order affirming, modifying or reversing an interlocutory order of a bankruptcy court, despite Congress' exclusion of language authorizing such an appeal in section 158(d) of Title 28 of the United States Code?

TABLE OF CONTENTS

TABLE OF CONTENTS (CONTINUED)

TABLE OF AUTHORITIES

CASES **PAGE(S)**

TABLE OF AUTHORITIES - continued

CASES **PAGE(S)**

TABLE OF AUTHORITIES - continued

CASES **PAGE(S)**

TABLE OF AUTHORITIES - continued

CASES **PAGE(S)**

FEDERAL STATUTES **PAGE(S)**

TABLE OF AUTHORITIES - continued

FEDERAL STATUTES **PAGE(S)**

LEGISLATION

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case. The decision of the United States Court of Appeals for the Second Circuit is reprinted in the Appendix to the Petitioner's Brief ("Petitioner's App.") at pages 34-47.

SUMMARY OF THE ARGUMENT

The petitioner argues that in regards to appeals from interlocutory orders entered by bankruptcy courts, section 1292(b) of Title 28 of the United States Code, constitutes an independent grant of jurisdiction to the United States Court of Appeals. This argument is advanced despite Congress' enactment of section 158(d) of Title 28 of the United States Code, which grants jurisdiction to the court of appeals only for final orders, decrees or judgments of district courts considering appeals of bankruptcy court decisions. The petitioner rests its argument on the lack of any language in section 158(d) prohibiting this result.

The respondent submits that Congress' enactment of section 158 evidences a clear intent to supersede the general statutory enactment set forth in sections 1291 and 1292 of Title 28 of the United States Code, which govern most decisions rendered by the district court, with the comprehensive program for appellate review of bankruptcy court decisions set forth in section 158.

ARGUMENT

I. THE COMPREHENSIVE APPELLATE PROCEDURE ENACTED BY SECTION 158 OF TITLE 28 PRECLUDES RELYING UPON SECTION 1292(b) TO GRANT JURISDICTION TO THE COURT OF APPEALS TO REVIEW AN INTERLOCUTORY ORDER BY THE BANKRUPTCY COURT

The petitioner's brief sets forth most of the background relevant to the issue on appeal, and there is no reason for the respondent to repeat this information. The petitioner's argument rests upon the contention that, for the purpose of considering an appeal of an interlocutory order entered by a bankruptcy court, sections 158(d) and 1292(b) of Title 28 constitute independent sources of jurisdiction for such an appeal.

Section 1291 of Title 28 grants to the court of appeals jurisdiction over appeals of the final decrees, orders or judgments of the district court. Section 1292 of Title 28 grants to the court of appeals jurisdiction to review appeals of certain interlocutory orders. In addition to providing for such appeals in certain specific situations, section 1292(b) permits a district court judge to certify that in the opinion of the court, such an order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an

immediate appeal from the order may materially advance the ultimate termination of the litigation. The court of appeals which would have jurisdiction of such an appeal may, in its discretion, permit an appeal of such an interlocutory order.

Section 158 of Title 28 is a separate statute governing appeals from decisions of bankruptcy courts. It was passed as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. This statute was enacted to resolve the constitutional issues raised in this Court's decision in Marathon Pipeline Co. vs. Northern Pipeline Const. Co., 459 U.S. 1094 (1983). Section 158(a) grants to the district court jurisdiction of appeals from final orders, judgments and decrees of the bankruptcy court, and appeals from interlocutory orders by leave of the district court. Section 158(d) grants to the court of appeals jurisdiction of appeals from all final decisions, judgment, orders and decrees entered by the district court on appeals from the bankruptcy court. Sections 1291 and 158(d) grant similar jurisdiction to the court of appeals for final orders. However, there is no equivalent grant of jurisdiction for interlocutory orders under section 158 as is ~~set~~ forth for non-bankruptcy matters under section 1292(b).

The majority of the circuits considering whether jurisdiction exists for the court of

appeals to review interlocutory orders entered by a bankruptcy court have found that the failure of section 158 to provide for such review is a clear indication that Congress did not intend such review under section 1292(b). Capitol Credit Plan of Tennessee, Inc. vs Shaffer, 912 F.2d. 749 (4 Cir. 1990); In re Topco, Inc., 894 F.2d. 727, 735 n. 12 (5 Cir. 1989); In re Benny, 791 F.2d. 712, 716-18 (9 Cir. 1986); In re Teleport Oil Co., 759 F.2d. 1376 (9 Cir. 1985). The petitioner apparently is attempting to dispute the holdings in these cases by arguing that sections 1291 and 1292 do not contain provisions conflicting with section 158, and therefore, both statutes apply to such appeals. Petitioners Brief, pages 13-14. However, this argument ignores the reasoning behind the lower court's decisions. These decisions are not based upon any conflict between language in sections 1291 and 1292, and section 158. The basis for these decisions is a recognition that section 158 was enacted as part of a comprehensive procedure for the handling of bankruptcy matters, which substantially differs from the manner by which the district courts administer non-bankruptcy matters. This comprehensive system was enacted by Congress with the passage of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. The bankruptcy judges in a district are designated as a unit of the district court, and are identified as the bankruptcy court for

that district. 28 U.S.C. section 151. Each district can provide for the automatic referral of all bankruptcy matters to the bankruptcy court. 28 U.S.C. section 157(a) Although bankruptcy judges cannot enter final orders on related matters absent the consent of the parties to an action, a bankruptcy judge can enter final orders or judgments in cases under Title 11 of the United States Code, and in matters that are considered core proceedings arising in a case under Title 11. 28 U.S.C. section 157(b). Therefore, although the bankruptcy court is considered a unit of the district court, it in fact has a unique position in that bankruptcy judges are granted responsibility for a particular area of law, and can enter final orders and judgments without de novo review by the district court or consent of the parties.[1]

"The bankruptcy appellate scheme now enacted in 28 U.S.C. section 158, which appears to be comprehensive, clearly supersedes 28 U.S.C. section 1291, covering appeals from final judgments of the district court, and would inferentially appear to supersede section 1292 as well." Nat'l Bank of Commerce vs. Barrier,

[1] A United States Magistrate, however, except for the authority to conduct hearings and enter orders pursuant to 18 U.S.C section 3142, can only enter final orders or judgments with the consent of the parties or subject to a de novo review by the district court. 28 U.S.C. section 636 (1988).

776 F.2d. 1298, 1299 (5 Cir 1985). In addition, if sections 1291 and 1292 are available as alternative basis of jurisdiction for appeals from interlocutory decisions of the bankruptcy courts, it would render section 158(a) superfluous; there would be no reason for enacting section 158 if Congress intended sections 1291 and 1292 to be available as a basis of jurisdiction for bankruptcy court decisions. Capitol Credit Plan of Tenn., Inc., 912 F.2d. at 753. It is a basic tenet of statutory interpretation that it is presumed the legislature will not enact superfluous statutes. Crandon vs. U.S., 494 U.S. 152, 171; 110 S.Ct. 997, 1008 (1980).[2]

Such a distinction is not arbitrary. There exists a strong policy behind this distinction. If the benefits of permitting interlocutory appeals in certain situations has been recognized by Congress and the courts, it also has been recognized that permitting such appeals is not without a cost. In re American Colonial

[2] Further support for the exclusivity of section 158 for appeals from the bankruptcy courts is found in 28 U.S.C. section 157. Section 157(b)(1) states: "Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, *subject to review under section 158 of this title*. (emphasis added). There is no mention of a review of such decisions under 28 U.S.C. sections 1291 or 1292.

Broadcasting Corp., 758 F.2d. 794, 800 (1st Cir. 1985). By setting up the procedure that now exists in the handling of appeals from bankruptcy courts, a new level of judicial involvement has been created for these matters. If appeals of bankruptcy court interlocutory decisions were permitted to be taken to the court of appeals, a party involved in a bankruptcy matter would be required to undergo two reviews rather than the one review required of parties in non-bankruptcy matters in the district court. Congress' limiting appellate review by the court of appeals to final bankruptcy court orders can be interpreted as recognition of this problem, and a desire to avoid imposing upon a party in a bankruptcy matter the cost associated with this additional level of review. Capitol Credit Plan of Tenn., Inc., 912 F.2d. at 753. This consideration is particularly relevant in the area of bankruptcy, since it has long been recognized that there exists important policies for expeditiously resolving bankruptcy cases. Katchen vs. Landy, 382 U.S. 323, 328-329 (1966).[3]

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[3] The petitioner cites these policies in support of its contention that appeals of interlocutory orders from the bankruptcy court should be permitted to the Court of Appeals. However, the added time and expense involved in pursuing appeals before both the district court and Court of Appeal, in fact, weighs against the petitioner's position. "The review available in the district court should eliminate most errors." Capitol Credit Plan of Tenn., Inc., 912 F.2d. at 753.

II. THE LEGISLATIVE HISTORY OF 28 U.S.C. SECTION 1293 SUPPORTS THE CONTENTION THAT THERE IS NO COURT OF APPEAL JURISDICTION FOR REVIEWING BANKRUPTCY COURT INTERLOCUTORY ORDERS

Section 1293 of Title 28 is the precursor of section 158. The legislative history relevant to the passage of section 158 of Title 28 of the United States Code is set forth in the Second Circuit's opinion in this matter, Germain v. Connecticut National Bank, 926 F.2d. 191 (2d. Cir 1991), *cert. granted*, 60 U.S.L.W. 3292 (U.S. Oct. 15, 1991). As set forth in this decision, the original legislation passed by the House of Representatives, H.R. 8200, would have conferred Article III status upon bankruptcy judges, and would have provided for amendments to sections 1291 and 1292 to provide for direct appellate review by the court of appeals of both final and interlocutory orders of the bankruptcy court. When the Senate version, S. 2266. was finally adopted by Congress, which created the current system, the amendments proposed by the House of Representatives to sections 1291 and 1292 were withdrawn. Instead, Congress proposed section 1293 of Title 28, which authorized the court of appeals' to have jurisdiction over final decisions of new bankruptcy panels, and to have jurisdiction over final decisions of the

bankruptcy courts if the parties agree to such a direct appeal. It was further proposed to amend section 1334 of Title 28 to provide for appellate review by the district court of final bankruptcy court orders and district court review of interlocutory orders of bankruptcy courts, but only by leave of the district court. No provision in these proposals made any reference to review by the court of appeals of decisions rendered by the district court reviewing decisions of bankruptcy courts. Rejecting these proposed amendments, Congress enacted section 1293(b), which included authorization for the court of appeals to review these decisions.

The withdrawal of the amendments to sections 1291 and 1292, which would have made these sections applicable to bankruptcy court orders, and the subsequent enactment of a separate statute governing appellate review of these decisions, clearly indicates a legislative intent to have section 1293 govern such appeals, rather than relying upon the statutes which govern appellate review of district court decisions in non-bankruptcy matters.

In determining legislative intent in the enactment of section 158(d), the petitioner, and also the Second Circuit Court of Appeals in its decision in this case, made reference to the statutory rule of construction that presumed repeal of a statute is only to be found by a

clear and manifest intent. Germain, 926 F.2d. at 196. (J.A. 46) However, it is difficult to see how section 158(d) in fact acts to repeal section 1292. Section 1292 applies to all non-bankruptcy matters in the district courts. Section 158(d) has limited application to bankruptcy matters. A separate statute to govern appeals of bankruptcy court decisions is justified by the fact that bankruptcy matters are handled in a different manner than non-bankruptcy matters. As noted above, such matters are automatically referred in most if not all districts to the bankruptcy courts, and the bankruptcy judges are entitled to enter final decisions, judgments or decrees in matters which are considered core proceedings. Unlike the review of decisions of United States magistrates, or bankruptcy judges issuing decisions in related bankruptcy proceedings, review by the district court of orders, judgments or decrees entered by the bankruptcy court in core proceedings requires the district courts to act as appellate courts, rather than courts of original jurisdiction. Instead of de novo review by the district courts, the standards governing appellate review would apply to the district courts. Georg vs. Parungao, 930 F.2d. 1563, 1566 (11 Cir. 1991). Therefore, section 158(d) is not in fact a repeal of section 1292, but rather a separate statutory program to handle a new judicial procedure created by Congress. Therefore, the enactment of section 158(d) does not have to

be viewed as an appeal of section 1292, but rather as a determination by Congress that the old statutory program for appellate review should not be applied to the subsequently enacted bankruptcy program.

Even if this rule of statutory construction is found to apply to the the issue in this case, this rule of construction is not the only rule relevant to the interpretation of section 158. All canons of construction are merely guidelines for the Court to observe in its examination of the legislative history and the intent of a particular statute. Rodzanower v. Touche Ross & Co., 426 U.S. 148, 164 (1976) (per dissenting opinion of Stevens, J.). Normally, two statutes capable of coexistence are each to be given effect, but only if their sense and purpose can be preserved. Watt v. Alaska, 451 U.S. 259, 267 (1981). Moreover, narrower and more specific statutes take precedence over general statutes unless the court finds a clear and manifest Congressional intent to the contrary. Crawford Fitting Co. v. J.T. Gibbons, Inc., 402 U.S. 437, 445 (1985); Busic v. United States, 446 U.S. 398, 406 (1980); Radzanower v. Touche Ross & Co., 426 U.S. at 153. These two rules of statutory construction support the contention of the respondent.

III. THE EFFECT OF DENYING COURT OF APPEAL REVIEW FOR INTERLOCUTORY ORDERS IN BANKRUPTCY MATTERS IS LIMITED BY THE RELIEF PROVIDED BY A WRIT OF MANDAMUS AND THE LIBERAL INTERPRETATION OF FINAL JUDGMENTS IN BANKRUPTCY MATTERS

A concern raised by the petitioner in its brief is the alleged detrimental effect the adoption of the respondent's position would have on parties in bankruptcy matters. Petitioner's Brief, page 33. The petitioner contends that failure to permit appeal of interlocutory orders will do violence to the purpose of section 1292. However, this fails to take into consideration that bankruptcy court interlocutory orders are already subject to potential review by the district courts. In addition, this claim also fails to take into consideration that the lack of jurisdiction over interlocutory orders will be minimized by the liberal standard applied by the courts in determining what constitutes a final order or decision in a bankruptcy case. The courts have recognized that, unlike general civil litigation, bankruptcy courts often enter final orders which can have a substantial and final effect on a number of parties. Given the nature of a bankruptcy proceeding, the courts have recognized that what constitutes a final judgment, order and decree in a bankruptcy matter must be viewed more liberally than

when that consideration is made in a general civil litigation. In re Jatran, Inc., 886 F.2d. 859, 861 (7 Cir. 1989); In re Brown, 803 F.2d. 120 (3rd Cir. 1986). Therefore, even though an order, judgment or decree may not terminate a bankruptcy case or proceeding, the courts will often find that it does constitute a final judgment, decree or order permitting review by the court of appeals. Brown, 803 F.2d. at 121. This would mitigate any detrimental effects of adopting the respondent's position. Jatran, Inc., 886 F.2d. at 861.

In addition, a writ of mandamus under section 1651 of Title 28 of the United States Code is available to the court of appeals for review of interlocutory orders of the bankruptcy courts. Nat'l Bank of Commerce, 776 F.2d. at 1299. Since the petitioner in this case did not request such relief, this Court is not considering the propriety of granting such relief in this case. Although the standard of granting a writ of mandamus is much higher than the standard for permitting appellate review of interlocutory orders, this writ is still available to a court of appeals if it feels that failure to review an interlocutory order would create a gross injustice. Coastal Steel Corp., 709 F.2d. at 198. Therefore, any detrimental effects of prohibiting the review of interlocutory orders by the court of appeals under section 1292 of Title 28 will be limited. Teleport Oil Co., 759 F.2d. at 1378.

CONCLUSION

It is apparent upon examination of section 158 and related statutes that this section is part of a program enacted by Congress for the administration of bankruptcy matters, separate from the administration of other non-bankruptcy matters handled by the district courts. Appellate review of non-bankruptcy matters is, instead, provided for in sections 1291 and 1292 of Title 28. Therefore, Congress' actions in including language in section 158 which provides for the same type of appellate review contained in section 1291, while failing to include language which permits the same type of review as provided for in section 1292, is a clear indication of Congress' intent to deny to bankruptcy court decisions the appellate review provided for in section 1292. In addition, such an interpretation advances the policy of encouraging expeditious administration of bankruptcy matters. Any detrimental effect of such an interpretation is limited by the liberal standard applied in determining whether a bankruptcy court decision is final in nature, and by the court of appeals' right to issue a writ of mandamus to provide for appellate review of interlocutory orders. Therefore, this Court should hold that section 158(d) of Title 28 prohibits a party from relying upon section 1292 of Title 28 to obtain court of appeal jurisdiction for the

review of a bankruptcy court's interlocutory orders.

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